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Something to Talk About: Is There a Charter Right to Access Government Information?

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Can sections 2(b) and 3 of the Canadian Charter of Rights and Freedoms be interpreted to protect a constitutional right of access to government information? The author argues that the constitutional principle of democracy provides a foundation for judicial recognition of such a constitutional right of access even though the inclusion of an explicit right to access to government information was rejected during the process of drafting the Charter. Given that the Supreme Court of Canada's section 2(b) and 3 jurisprudence has been informed by the principle of democracy, the application of the principle may now guide the Court to include protection of access to government information in its evolving interpretation of those Charter rights. Finally, a hypothetical case is considered in order to outline ways in which a constitutional right to access may be justifiably limited.

Le paragraphe 2(b) et l'article 3 de la Charte canadienne des droits et libertés peuvent-ils être interprétés de façon à protéger un droit constitutionnel d'accès aux renseignements détenus par le gouvernement? L'auteur prétend que le principe constitutionnel de démocratie constitue un fondement pour la reconnaissance judiciaire d'un tel droit constitutionnel d'accès, même si l'inclusion d'un droit explicite d'accès aux renseignements détenus par le gouvernement a été refusée au moment de la rédaction de la Charte. Étant donné que les arrêts de la Cour suprême du Canada concernant le paragraphe 2(b) et l'article 3 de la Charte s'appuient sur le principe de démocratie, l'application du principe peut désormais guider la Cour et l'inciter à inclure la protection de l'accès aux renseignements détenus par le gouvernement dans son interprétation évolutive des droits garantis par la Charte. Enfin, l'auteur étudie une situation hypothétique pour illustrer des façons dont un droit constitutionnel d'accès pourrait être restreint de façon justifiable.

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Introduction

Access to government information has become a foundation of modern democratic governance. Over the past fifty years, both courts and legislatures in Canada have increasingly recognized the importance of access to government information in maintaining the openness and accountability that is crucial for our democratic order. In the judicial realm, developments in the common law have eroded the power of governments to shield documents from disclosure in litigation. In the legislative realm, laws have been introduced by all levels of government to facilitate access to government information. In the process of interpreting such access to information legislation, courts have steadfastly insisted that limitations on access must be narrowly construed in order to promote the primary purpose of these acts, namely protecting the access to information necessary to ensure government accountability and the political participation of citizens.

Notwithstanding the near universal recognition of its importance as a cornerstone of effective democratic governance, the protection of access to government information remains tenuous in Canada. Bureaucratic resistance, sometimes unscrupulous (and unsupervised) exercise of administrative discretion and regressive legislative amendments have all been identified as potential threats to our access to information concerning

government activity.[1] This article explores the degree to which these threats may be countered by constitutionally-grounded protections. In particular, I argue that the constitutional principle of democracy provides the necessary foundation for the constitutional protection of access to government information through sections 2(b) and 3 of the *Charter*.[2]

I begin by considering the ways in which the importance of access to government information has been recognized in principle by academics, parliamentarians and others both in Canada and abroad. I then proceed to consider how this principled recognition of the importance of access to government information may be supplemented by practical, constitutional protection through the interpretation and application of sections 2(b) and 3 of the *Charter*. In particular, I address three major questions raised by previous judicial decisions that have rejected recognition of a constitutional right to access government information: (1) Where is the access gap in the Constitution? (2) Why should judges fill the access gap instead of legislatures? (3) How can the principle of democracy help to fill the access gap in the Constitution?

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1. See, e.g. Information Commissioner of Canada, *Annual Report 2003-2004* (Ottawa: Minister of Public Works and Government Services Canada, 2004) [Information Commissioner of Canada, *2003-2004*] at 3. The Information Commissioner of Canada expressed his continuing concern in his 2004-2005 Annual Report: *Annual Report 2004-2005* (Ottawa: Minister of Public Works and Government Services Canada, 2004). In 2007, the newly appointed Information Commissioner, Robert Marleau, echoed the concerns raised by previous commissioners. He stated: "Despite much progress since 1983, there remain impediments to the full realization of Parliament's intent as expressed in the [*Access Act*]. Too often, responses to access requests are late, incomplete, or overly-censored. Too often, access is denied to hide wrongdoing, or to protect officials or governments from embarrassment, rather than to serve a legitimate confidentiality requirement." Information Commissioner of Canada, *Annual Report, 2006-2007* (Ottawa: Minister of Public Works and Government Services Canada, 2007) at 11. See also, Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services, 2002) at 44; Information Commissioner of Canada, "Remarks to House of Commons Standing Committee on Justice and Human Rights (Bill C-36)" (October 23, 2001), online: Information Commissioner of Canada http://www.infocom.gc.ca/speeches/speechview-e.asp?intspeechId=61; Information Commissioner of Canada, "Remarks to the University of Alberta's 2006 Access and Privacy Conference's Appreciation Dinner – "The Future of Accountability – the Federal Government's Accountability Act and Discussion Paper and the Open Government Act" (June 14, 2006), online: Information Commissioner of Canada <http://www.infocom.gc.ca/speeches/speechview-e.asp?intSpeechId=128&bln Print=tru.> at 9ff; Information Commissioner of Canada, *Proposed Changes to the Access to Information Act: Presentation to the Committee on Access to Information, Privacy And Ethics* (Ottawa: Information Commissioner of Canada, 2005), online: Information Commissioner of Canada <http://www.infocom.gc.ca/specialreports/2005reform-e.asp>. For judicial commentary, see: *Canadian Council of Christian Charities v. Canada,* [1994] 4 F.C. 245 at 255; *Information Commissioner v. Minister of the Environment,* [2001] 3 F.C. 514 (T.D.); *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421, at para 30; *Canada (Information Commissioner) v. Canada (Commissioner of the R.C.M.P.)* 2003 SCC 8, [2003] 1 S.C.R. 66 at para 17.

2. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 2(b) and 3 [*Charter*].

Each of these questions involves a consideration of the role of the principle of democracy in the interpretation of sections 2(b) and 3 of the *Charter*. In response to the first and second questions, I consider how reliance on the unwritten principle of democracy as an interpretive aid may be justified even though the inclusion of an explicit right to access to government information was rejected during the process of drafting the *Charter*. In response to the third question, I consider the ways in which the Supreme Court of Canada's section 2(b) and 3 jurisprudence has already been informed by the principle of democracy and how application of the principle may now guide the Court to include protection of access to government information in its evolving interpretation of those *Charter* rights.

Finally, I consider the way in which the arguments in favour of protecting the right to access may be weighed against other values such as the need to protect the efficacy of government decision-making processes. More specifically, I consider how such a right to access government information may be applied to challenge the mandatory exemption of Cabinet secrets from disclosure under Ontario access legislation and the arguments that may be advanced to justify such a limitation of a constitutional right to access.

I. *The promise of access: recognizing the importance of access to government information in Canada*

Access to government information has not always been recognized as an important element of the democratic process in Canada. At the time of Confederation, the concept of providing the public access to government information was an unfamiliar one to say the least. This is not surprising given that the concept of representative government was still in its infancy in the former colony and the scope of government remained, by modern standards, infinitesimal. Over time, access to government information has become more important as the role of government has expanded and as citizens' expectations of participation in, and accountability of, the process of governance have increased. In particular, recognition of the need to protect access to government information has grown dramatically since the end of the Second World War and the corresponding expansion of

government activity in the past half-century.[3] By the late 1970s, Canadian politicians started to acknowledge the need to provide access to government information, leading ultimately to the enactment of the federal *Access to Information Act* in June 1982.[4] All provinces and territories now have some form of legislation protecting access to government information.[5]

The fundamental argument in favour of access to government information that has been advanced by academics,[6] government

3. For a discussion of this process, see: Alasdair Roberts, "Structural Pluralism and the Right to Information" (2001) 51 U.T.L.J. 243 at 259-60 [Roberts, "Structural Pluralism"]. Roberts has argued in general terms that a constitutional right to access government information could be linked to the right to freedom of expression and the right to vote. This article will provide a more detailed and specific argument demonstrating how existing Canadian jurisprudence may be interpreted to support the recognition of a constitutional right to access government information in Canada through the application of the constitutional principle of democracy.

4. R.S.C. 1985, c. A-1 [*Access Act*]. The *Act* came into force on July 1, 1983.

5. *Access to Information and Protection of Privacy Act,* S.N.L. 2002, c. A-1.1; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Freedom of Information and Protection of Privacy Act,* S.P.E.I. 2001, c. 37; *Right to Information Act,* S.N.B. 1978, c. R-10.3; *An Act respecting Access to Documents held by Public Bodies and the Protection of Personal Information,* R.S.Q. c. A-2.1; *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31; *Freedom of Information and Protection of Privacy Act,* S.M. 1997, c. 50; *Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01; *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25; *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165; *Access to Information and Protection of Privacy Act (Nunavut),* S.N.W.T. 1994, c. 20; *Access to Information and Protection of Privacy Act (Nunavut),* S.N.W.T. 1994, c.20; *Access to Information and Protection of Privacy Act*, R.S.Y. c. 1.

6. Donald C. Rowat, "How Much Administrative Secrecy?" (1965) 31 Can. J. Econ. Polit. Sc. 479 at 480. Rowat argued: "Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view." A similar sentiment was expressed by T. Murray Rankin in 1977, when he wrote: "The right to confront the decision-making apparatus of the State with informed opinions is the foundation of liberal democracies... Access to government information is essential to participatory democracy." T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) [Rankin, *FOI in Canada*] at 154-155. In 1979, the Canadian Bar Association (CBA) proposed a model freedom of information bill. The CBA stated: "[t]he citizen's ability to participate depends directly upon the amount of information at his disposal." Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (Ottawa: CBA, March 1979) at 6. For similar arguments, see, for instance: Roberts, "Structural Pluralism", *supra* note 3 at 263; Robert Tardi, *The Law of Democratic Governing: Principles (Vol. I)* (Toronto: Thomson Carswell, 2004) at 38; Craig Forcese, "Clouding Accountability: Canada's Government Secrecy and National Security Law "Complex" (2004-2005) 36 Ottawa L. Rev. 49 at paras. 30-31. Other academic discussions of the importance of access to government information to democratic governance include: Donald G. Rowat, ed., *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, Dept. of Political Science, 1985); John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981); T. Murray Rankin, "The New Access to Information and Privacy Act: A Critical Annotation" (1983) 15 Ottawa L. Rev. 1. For a general discussion of the evolution of access to information legislation in Canada at the federal level see, Tom Onyshko, "The Federal Court and the *Access to Information Act*" (1993) 22 Man. L.J. 73.

commissions,[7] law reform commissions,[8] government Green papers[9]

7. Ontario, Report of the Commission on Freedom of Information and Individual Privacy, *Public Government for Private People* (Toronto: Commission on Freedom of Information and Individual Privacy 1980). The Commission, commonly known as the Williams Commission, noted the importance of ensuring that citizens have sufficient information concerning government, stating: "... there is no question that an informed citizenry, one that has access to government-held information, is better able to make effective use of the means of expression of public opinion on political questions." *Ibid.* at 78.

8. Australian Law Reform Commission, *Open Government: a review of the federal Freedom of Information Act, 1982*, online: <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ > [*Open Government Report*]. The *Open Government Report* underlined that the fundamental reason for providing access to government information is "to ensure open and accountable government." (s. 2.2). It described the link between representative democracy and access to government information, stating at (s. 2.3). :

> Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. **The effective operation of representative democracy depends on the people being able to scrutinize, discuss and contribute to government decision making. To do this, they need information.** While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our representative democracy by giving individuals the right to demand that specific documents be disclosed. **Such access to information permits the government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government**...
>
> ...
>
> Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Its availability and dissemination are important for the economic and social well-being of society generally. [Emphasis added]

See also, Law Commission of New Zealand, *Review of the Official Information* Act (*Report 40*) (Wellington: Law Commission, 1997), online: Law Commission of New Zealand <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_42_118_R40.pdf> [Report 40]; and U.K., *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (London: Her Majesty's Stationary Office, 1997), online: Freedom of Information White Paper <http:www.archive.official-documents.co.uk/document/caboff/foi/foi.htm>.

9. Hon. John Roberts, Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa: Minister of Supply and Services, Canada, June 1977). In this Green Paper, which preceded the introduction of the federal *Access Act* the government noted that: "Open government is the basis of democracy." It should be noted that this Green Paper was criticized as including too many proposed restrictions on access to government information. See, e.g. Tom Onyshko, "The Federal Court and the *Access to Information Act*," (1993) 22 Man. L.J. 73. at 78. T. Murray Rankin criticized the Green Paper, stating: " ... by the paucity of its analysis, the blurring of its stated options, and the misrepresentation of the goals and practices of freedom of information legislation, the Green Paper leaves little doubt that meaningful legislation will not be forthcoming." T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) at 133.

parliamentary committees,[10] and government task force reports[11] may be summarized as follows. Democracy is based on the right of citizens to participate in the process of governance. The size of most modern democracies precludes large-scale direct participation in the process of governance. As such, the primary aspect of this citizen participation is the process of selecting those candidates who will govern on behalf of the citizens. Citizens select these candidates on the basis of their proposed policies or programs of government and, in the case of incumbent candidates, on the basis of their performance in government. In order to ensure that citizens can participate effectively in the democratic process, they require information about the proposed policies of the candidates for public office and about the performance of the government. Access to this information allows citizens to make informed choices when voting. It allows them to hold the government accountable for its actions.

In short, political participation requires more than just a right to discuss political ideas; it also requires a right to an *informed* discussion that includes information about the actions taken by government. Access

10. Report of the Standing Committee on Justice and the Solicitor General on the Review of the *Access to Information Act and the Privacy Act*, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer of Canada, 1987) [*Open and Shut*]. In the introduction to its review of the federal *Access Act*, the Standing Committee noted that the general principle underlying the report was "the conviction shared by all parliamentarians that Canadian democracy is strengthened by making government, its bureaucracy and its agencies accountable to the electorate and by protecting the rights of individuals against possible abuse." (at 2). The Committee explained the role of protections for access to government information in ensuring the movement towards greater accountability of governments, stating:

> The development of access legislation is part of a widespread 'open government' movement in democratic societies. Democracies are strengthened by the ability of electorates to hold decision makers responsible for their policies and actions. Access legislation is one element of this general trend toward greater accountability. (at 4) [citations omitted].

11. Government of Canada, *Access and Privacy: The Steps Ahead* (Ottawa: Minister of Supply and Services, 1987) at 29. In this response to the *Open and Shut* report, the Canadian government explicitly recognized the importance of access to government information in furthering government accountability and public participation in the political process. It stated:

> The government recognizes that Canadians need access to a wide range of information about their government. There is a compelling public interest in openness, to ensure that the government is fully accountable for its goals and that its performance can measured against these goals. (sic) This renders the government more accountable to the electorate and facilitates informed public participation in the formulation of public policy. It ensures fairness in government decision-making and permits the airing and reconciliation of divergent views across the country.

See also, Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Public Works and Government Services, 2002). In the introduction to its 2002 report, the Access to Information Review Task Force noted the impact of the September 11th attacks, but went on to emphasize the continued importance of access to information to Canadian society. It noted that: "... the tragedy has also made us more aware than ever that democracy and openness are fundamental values of the society we all want to live in." (at 1).

to government information provides access to contextual information that allows a meaningful evaluation of political ideas, policies and conduct. It supplements the right to political speech with a right to political information; it supplements a right to talk with a right to have something to talk about.

Unfortunately, the principled recognition of the importance of access has not always translated into protection in practice. Notwithstanding the existence of seemingly robust legislative access regimes, concerns about government resistance against access requests and, in some cases access rights, remain. Is there a way to fortify our existing access rights? Is there a way to match the principled recognition of the importance of access to government information with the practical protection of that access? Is a higher order of constitutional protection available?

A strict, literal reading of the text of the Canadian Constitution would suggest not. A right to access to government information is not explicitly included in the text of the Constitution. However, there is nothing strict or literal about the prevailing methods of interpreting the Canadian Constitution. As such, it is arguable that constitutional protection for access to government information is not dependent on an explicit constitutional provision outlining a right of access. Instead, constitutional protection of such a right of access may be rooted in a broader interpretation of the Constitution and of the protection afforded by the Constitution to the democratic process through sections 2(b) and 3 of the *Charter*.

At the outset it must be recognized that, at least until very recently, courts in Canada have been reluctant to recognize access to government information as part of the scope of the protection afforded by the *Charter*. In particular, Canadian courts have resisted claims that s. 2(b) protects a right to access information pertaining to the financial funding provided to a particular criminal investigation,[12] to access data concerning criminal

12. *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) [*Fineberg*]. *Fineberg* related to a request for disclosure made by the respondent newspaper reporter of the Ministry of the Attorney General. Fineberg requested information pertaining to the financial funding provided to a particular criminal investigation. The Minister refused disclosure based on section 14 of the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [*FOIPPA*], which permitted a head of department to refuse disclosure of information in certain categories. The inquiry officer of the Ontario Information and Privacy Commissioner ordered the Ministry to disclose much of the requested information, but held that some of the information was not relevant to Fineberg's request.

The Ministry applied for judicial review of the inquiry officer's decision. Fineberg cross-appealed, arguing, in part, that certain provisions of *FOIPPA* violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Divisional Court dismissed the Ministry's application and allowed the cross-appeal in part. However, the.Divisional Court rejected Fineberg's argument that section 2(b) of the *Charter* included a right to access government information.

offenders,[13] to access sealed records of a meeting between a debtor and his receiver[14] and to access records of an investigation of the conduct of Crown attorneys and police officers in a failed murder investigation and trial.[15]

In the argument that follows, I will demonstrate how the objections to recognizing constitutional protection for access to government information raised in these cases may be overcome. In particular, I will demonstrate how the principle of democracy may provide the foundation for the recognition of a constitutional right to access government information in ss. 2(b) and 3 of the *Charter*. To make this argument, I will have to address three major concerns that have been raised in the cases thus far. The first question is: why should constitutional protection be extended beyond a strict interpretation of the existing written constitutional provisions that have been designed to protect the democratic process. In more colloquial terms: where is the access gap in the Canadian Constitution? A question of equal importance is: if a gap is identified, why should the courts fill it instead of the legislature? Finally, assuming that an access gap can be identified, the third question raised is: how can the principle of democracy help to fill the access gap in the Constitution? Put another way, how may the principle of democracy inform the interpretation of existing *Charter* provisions in a way that moves beyond the limits of the existing jurisprudence?

I will address these questions below. However, before doing so, it is worth briefly reviewing the Supreme Court of Canada's discussion of the role of unwritten constitutional principles in the process of constitutional interpretation.

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13. *Yeager v. Canada (Correctional Service)* (2003), 223 D.L.R. (4th) 234 (Fed. C.A.) [*Yeager*]. *Yeager* involved a claim that the Correctional Service of Canada infringed the applicant's s. 2(b) *Charter* right by refusing to produce certain data concerning offenders, a code book necessary to interpret the data and a copy of software used to compile the data. The Correctional Service refused to provide the data on the basis that it would interfere with the operation of the facility concerned.

14. *National Bank of Canada v. Melnitzer* (1991), 5 O.R. (3d) 234 (Gen. Div.) [*Melnitzer*]. *Melnitzer* concerned an order sealing the minutes of the meeting between Melnitzer and the receiver of his assets, undertakings and businesses. A newspaper moved to have the sealing order set aside, arguing that the order infringed the right to freedom of the press entrenched in s. 2(b) of the *Charter*. Justice Killeen found that the order should be varied, but rejected the applicant newspaper's argument that s. 2(b) had been infringed.

15. *Criminal Lawyers Association v. Ontario (Ministry of Public Safety and Security)* (2004), 70 O.R. (3d) 332 (Ont. Div. Ct), rev'd 2007 ONCA 392, 280 D.L.R. (4th) 193 [*Criminal Lawyers Association*], leave to appeal to S.C.C. granted, [2007] S.C.C.A. No. 382. The case was heard by the S.C.C. on 8 December 2008. The court reserved its decision. This case is discussed in more detail below.

II. *Roles for unwritten constitutional principles in constitutional interpretation*

The Supreme Court of Canada has identified a number of different roles that may be fulfilled by unwritten constitutional principles. In the *Quebec Secession Reference*, the Court emphasized that unwritten principles may assist "in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of political institutions."[16]

Assisting in the interpretation of the written provisions of the Constitution is perhaps the least contentious of the roles of unwritten principles. The Supreme Court of Canada has adopted a generous approach to the interpretation of the law of the Constitution. The two guiding principles of this approach are that the Constitution as a whole must be interpreted broadly (as a living tree capable of growth within its natural limits) and that the rights protection provisions of the *Charter*, in particular, should be interpreted in a purposive manner "in light of the interest [they were] meant to protect".[17] This method of interpretation is "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection."[18]

This approach to interpretation of the written text is based on the assumption that the terms of the text should not be frozen in time, but rather should be allowed to grow and change in order to meet the needs of an evolving society.[19] It is also based on the expectation that the Constitution ultimately will provide a comprehensive framework for governance. Not surprisingly, the key to providing such a broad interpretation is to identify the fundamental principles that underlie the more explicit provisions of the text—to seek the "broader philosophy which is capable of explaining the past and animating the future" in Chief Justice McLachlin's words.[20] As such, unwritten constitutional principles are not just necessary for the identification of the current scope of rights and obligation or the current roles of political institutions, they also have a vital role to play in the development and evolution of the Constitution. As noted in the *Quebec Secession Reference*: "observance of and respect for these principles

16. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 52 [*Quebec Secession Reference* cited to S.C.R.].
17. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at para. 116.
18. *Ibid.* at para. 117.
19. *Ref. re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)*, [1991] 2 S.C.R. 158, (1991), 81 D.L.R. (4th) 16 at 32-33 [*Saskatchewan Electoral Boundaries Reference*, cited to D.L.R.].
20. *Ibid.*

is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree'..."[21]

The Court has emphasized the importance of the written provisions of the Constitution, particularly the stabilizing effect of those provisions, noting that "there are compelling reasons to insist upon the primacy of our written Constitution. A written Constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."[22] Thus, the Court has noted that unwritten principles may not "be taken as an invitation to dispense with the written text of the Constitution."[23] However, the majority of the Court also agreed with then Chief Justice Lamer's finding in the *Provincial Judges Reference* that the preamble to the *Constitution Act, 1867* "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."[24] As such, the Court has found that, in addition to assisting in interpreting the text, unwritten principles may be used to supplement the text in cases where the text does not provide a clear answer to the issue to be determined.

How have Canadian courts reacted to these guidelines? Canadian courts have insisted that unwritten constitutional principles cannot be relied upon where there is no gap in the coverage provided by the written provisions of the Constitution. Several cases are worthy of note in this regard. In *UL Canada Inc. v. Quebec (Attorney General)*,[25] the appellant argued that the principle of federalism should be applied to strike down a section of the *Dairy Products and Dairy Products Substitutes Act*[26] that authorized the Quebec government to make regulations governing the colour of margarine. In effect, the appellant argued that the provision violated the principle of federalism because it prevented the free movement of yellow-coloured margarine into the province of Quebec. The Quebec Court of Appeal found that the appellant was effectively trying to import a right to a common market into the Constitution. It refused to apply the principle of

21. *Quebec Secession Reference, supra* note 16 at 410.
22. *Ibid.*
23. *Ibid.* at 411. See also, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, (*sub nom. Reference re: Public Sector Pay Reduction Act (P.E.I.), s.10*), 150 D.L.R. (4th) 577 at 620-621 [*Provincial Judges Reference* cited to D.L.R.]; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 at 376 [*New Brunswick Broadcasting* cited to S.C.R.].
24. *Provincial Judges Reference, ibid.* at 626-27; *Quebec Secession Reference, supra* note 16 at 411.
25. (2003), 234 D.L.R. (4th) 398 [*UL Canada Inc.*].
26. R.S.Q., c. P-30, s.42.

federalism in the case, finding that there was no constitutional gap to be filled as ss. 91(2), 92(13), 92(16) and 121 of the *Constitution Act, 1867* provided the necessary framework of constitutional rules to deal with the issue.[27]

Similarly, in *Baie D'Urfé (Ville) c. Québec (Procureur Général)*[28], the Quebec Court of Appeal refused to apply unwritten constitutional principles to invalidate provincial legislation that abolished certain municipalities while creating others.[29] The plaintiffs argued that, by allowing the abolition of municipalities that were predominantly populated by Anglophones, the legislation violated the principles of protection of minority rights and the principle of federalism. The Quebec Court of Appeal rejected this argument noting that the plaintiffs failed to demonstrate a gap in the Constitution that could trigger reliance on unwritten constitutional principles.[30]

In particular, the Court of Appeal found that the mere fact that the issue of whether provinces had the power to eliminate municipalities is not dealt with expressly in the Constitution does not mean there is a constitutional gap.[31] In the Court of Appeal's view, if the framers of the Constitution had wanted to protect municipal institutions as opposed to e[illegible]ucational or religious institutions, they would have included such protection explicitly in the text of the Constitution. To now apply unwritten constitutional principles to protect Anglophone municipal institutions would amount to rewriting history in the Court's mind.[32]

In addition to doubting that mere silence in the Constitution constitutes a gap, Canadian judges have looked to the constitutional drafting process to determine whether failure to protect a particular right is intentional as opposed to unintentional. The best example of this is in respect to the purposeful omission of protection of property rights in the *Charter*. In

27. *UL Canada Inc., supra* note 25 at paras. 65-71.

28. [2001] R.J.Q. 2520, 27 M.P.L.R. 173, (*sub nom. Westmount (Ville) c. Québec (Procureur Général)*)108 A.C.W.S. (3d) 980 [*Baie D'Urfé*], (leave to appeal to S.C.C. dismissed), [2001] 3 S.C.R. xi.

29. *Act to reform the municipal territorial organization of the metropolitan regions of Montreal, Quebec and the Outaouais,* S.Q. 2001, c. 25.

30. *Baie D'Urfé, supra* note 28 at para. 92. The Court stated:
> En réalité, ils invoquent ces principles, non pour combler des vides, mais bien pour mettre de côté la competence des provinces et enchâsser dans la Constitution de nouvelles obligations linguistiques en matière municipale. Ils ignorent l'importance de la réserve formulée par la Cour suprême qui prévoit que la reconnaissance des principes non écrits ne peut être interpretée comme constitutant une invitation à négliger le texte écrit de la Constitution.

31. *Ibid.* at para 106. In the Court's words: "Le seul silence de la Constitution écrite ne constitute pas nécessairement un vide."

32. *Ibid.* See also, *Potter c. Québec (Procureur général),* [2001] J.Q. No. 5553 (C.A.).

Irwin Toy,[33] a majority of the Supreme Court specifically noted that the exclusion of property rights from protection under section 7 of the *Charter* could be contrasted to the inclusion of protection of such rights in the American Bill of Rights. The majority found that the intentional exclusion of protection of property from the express terms of section 7 meant that protection of property rights should not be read into the *Charter* after the fact.[34] In subsequent cases, the Supreme Court has held that pure economic rights are excluded from *Charter* protection.

The fact that property rights were intentionally excluded from the *Charter* by the constitutional framers has been interpreted by some to mean that the absence of property rights in the Constitution may not be considered a gap in the coverage of the Constitution.[35] However, we shall see below that the impact of such exclusionary decisions in the constitutional drafting process remains uncertain.

III. *Where is the "access gap" in the Canadian constitution?*

At the very least, the above cases suggest that any argument in favour of identifying an access gap in the Canadian Constitution must consider both those rights that have been expressly included in the written provisions of the Constitution and the rights that have been purposefully excluded from those written provisions. Where then, does access to government information fit within the existing constitutional framework of protections for the democratic process?

The scope of constitutional protection of the democratic process has expanded over time. Sections 17, 20, and 50 were the most explicit constitutional protections of democratic governance in the *Constitution*

33. *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

34. *Ibid.* at para. 96. The majority decision stated: "...The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person".

35. For example in *Shaw v. Stein*, [2004] SKQB 194 at para. 26, Justice Smith found that:
> ...the absence of property rights in the Charter is not a result of an oversight. The Charter was born out of protracted negotiations which generated numerous drafts. In the end there was a conscious decision not to create constitutional protection for property rights as exists in the Constitution of the United States of America or which were part of the earlier Canadian Bill of Rights.

Act, 1867.[36] These provisions were supplemented by the *Charter*, which included several new sections explicitly recognized as "democratic" rights." These new *Charter* provisions, specifically sections 3, 4 and 5 of the *Charter*, are meant to ensure that our system of government is more representative by guaranteeing that all citizens can participate in the selection of representatives,[37] that the representatives chosen by the citizens will be called together every year to conduct the nation's business,[38] and that the representatives will be held accountable at least every five years.[39] The importance of these rights is underlined by the fact that they are not included within the ambit of the override provision, s. 33 of the *Charter*.

The *Charter* also includes provisions protecting rights that have been recognized as fundamental to the proper functioning of democracy.[40] In particular, section 2 of the *Charter*, which lists "fundamental freedoms", protects freedom of conscience and religion, freedom of thought, belief, opinion and expression, including freedom of the press and other media, freedom of peaceful assembly and freedom of association.

In light of these substantive constitutional protections, the argument in favour of recognizing a constitutional right of access to government information must demonstrate that protection beyond the scope of the current interpretation of these written provisions is merited. This is precisely the type of argument advanced by Chief Justice Lamer's majority reasons in the *Provincial Judges Reference*.[41] In that case, Chief Justice Lamer found that the scope of protection afforded to the principle of judicial independence must extend beyond the then existing interpretation of section 96 of the *Constitution Act, 1867* and section 11(d) of the *Charter*. In his judgment, he found that the protection of judicial independence was not limited to the strict terms of the text of the Constitution, but rather was rooted in a broader unwritten principle. That unwritten principle mandated

36. *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, ss. 17, 20 and 50 reprinted in R.S.C. 1985, App. II, No. 5. Section 17 states: "There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons". Section 20 stated: "There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first sitting in the next Session." Section 20 was repealed by the *Constitution Act, 1982* and replaced by section 5 of the *Charter*. Section 50 states: "Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer." Section 50 has been supplemented by s. 4 of the *Charter*.

37. *Charter, supra* note 2, s. 3.

38. *Ibid.*, s. 5.

39. *Ibid.*, s. 4.

40. Jeremy Kirk, "Constitutional Implications From Representative Democracy" (1995) 23 Fed. L. Rev. 37 at 49-50.

41. *Provincial Judges Reference, supra* note 23.

that the protection of judicial independence afforded by section 11(d) of the *Charter* be extended beyond judges dealing with criminal "offences", as explicitly stated in the text of the section, to include also provincial court judges not seized with criminal law matters.[42]

The argument advanced here is that the scope of the written provisions of the Constitution (as they have been interpreted to date) is insufficient to provide the necessary protection of the democratic process. As a result, a gap has developed that must be filled through recourse to the unwritten principle of democracy that underlies the written terms of the Constitution. Several questions remain to be answered. The first is: what has changed in the past twenty-five years to create a need for constitutional protection that arguably was not recognized in 1982 when the scope of explicit constitutional protection of the democratic process was extended by entrenching ss. 2-5 of the *Charter*?

Here it is important to recall that the Special Joint Committee of the Senate and the House of Commons charged with reviewing draft provisions of the *Constitution Act, 1982* considered a motion to include an explicit provision protecting a right to government information. The motion proposed that a clause be inserted into the *Charter* as follows: "Everyone has a right to have reasonable access to information under the control of any institution of any government."[43]

The acting Minister of Justice, Robert Kaplan, opposed the motion before the Special Joint Committee arguing that to enshrine a right to information in the Constitution would amount to a "very serious abandonment by Parliament of a responsibility to deal with the question of access to information."[44] In short, he argued that the government recognized that there should be a right to information and that it was moving to protect that right through its proposed access to information legislation.[45] The acting Minister of Justice also argued that to entrench the right to information in the Constitution would be unwieldy in the absence of existing access legislation as it would effectively require the courts to deal with access requests on an ad hoc basis until it had constructed an access regime based on its jurisprudence.[46]

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42. *Ibid.* at paras. 126-129 and ff. However, the Chief Justice noted that the level of independence extended by provincial court judges may not be the same as that enjoyed by superior court judges.

43. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 43(22 January, 1981) at 101 (Hon. Robert Kaplan) [*Minutes of the Special Joint Committee*].

44. *Ibid.* at 105.

45. The federal *Access Act* had not yet been passed into law at this time, although it had been drafted.

46. *Minutes of the Special Joint Committee, supra* note 43.

The acting Justice Minister's arguments were rejected by opposition members of the Special Joint Committee who noted that entrenching the right to information in the *Charter* would not prevent the government from enacting its proposed access legislation, rather it would constitutionally mandate such legislation and provide assurance that the legislation could not be arbitrarily removed by future governments.[47] Nonetheless, the motion to include a right to information in the *Charter* was defeated by a vote of 14 to 10 in the Special Joint Committee.[48]

The rejection of the proposed motion is not surprising given the government's opposition to the motion and its dominance of the membership of the committee. However, it is worth noting that the government's opposition to the inclusion of a right to access government information in the Constitution was not absolute. Rather, the acting Minister of Justice insisted that the government believed that it was important to establish a legislative framework for access *prior* to entrenching a constitutional right of access. Acting Minister Kaplan even contemplated that at some point the Canadian Constitution should include protection of a right to access government information. He stated:

> ... I want in closing to concede that at some point in our history when this is legislated, when some other piece of legislation is legislated, it might very well be down the road in the development of our constitution, once the basic concept of freedom of information is developed, as they are in the process of being developed now, to talk about entrenchment...[49]

In this way, the decision not to include protection of a right to access government information in the *Charter* may be distinguished from the decision to exclude property rights. The latter decision was a principled decision to exclude a particular type of right from constitutional protection. By contrast, the decision not to include protection of access to information was not based on a principled rejection of constitutional protection of such a right. Rather, it was based on considerations of ripeness, particularly the argument that a statutory framework should be established prior to entrenching a right to access.

It is in keeping with the acting Minister of Justice's comments to note that even by the time the *Canadian Charter of Rights and Freedoms* was constitutionally entrenched in 1982, the importance of access to government information in the democratic process was only beginning to

47. *Ibid.* at 109-110 (James McGrath); 110-112 (Perrin Beatty); 112-114 (Fraser); 114-116 (Svend Robinson).
48. *Ibid.* at 116.
49. *Ibid.* at 106.

be fully appreciated. Certainly there had been little legislative experience with a general right to access government information in Canada prior to that time. However, in the quarter century since the entrenchment of the *Charter*, both the recognition of the importance of access to government information and the implementation of legislative access regimes has blossomed in Canada and internationally.

It is also important to recall that the Supreme Court has specifically recognized that the need for the *Charter* to evolve over time in order to address changing circumstances is an important reason not to place too much weight on the statements made by those involved in the drafting of the *Charter*. Thus, in the *B.C. Motor Vehicle Act Reference*, then Justice Lamer noted the near impossibility of ascertaining the intention of the legislative bodies that adopted the *Charter*.[50] He went on to warn against giving too much weight to the records of the discussions in the Joint Committee, writing:

> Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the Charter debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the Charter, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.[51]

In light of the growing recognition of the importance of access to information to the democratic process, it is arguable that the time has come to extend the reach of the Constitution to protect access. The recognition of such a right would fill a gap that has developed over time as our democracy has matured and the expectations of citizens to be involved in the process of

50. *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486 at para. 52. Justice Lamer stated:

> Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

51. *Ibid.* at para. 53.

governance, through mechanisms of participation and accountability, have outstripped the existing constitutional protections for those mechanisms.

The fundamental change in the democratic process that has occurred over the last twenty-five years, which has culminated in the near universal recognition of the vital role of access to government information in ensuring effective democratic governance, thus provides an impetus to look beyond a strict interpretation of the written terms of the Constitution that are designed to protect the democratic process, particularly sections 2(b) and 3 of the *Charter*. Such a search naturally involves a consideration of the principle of democracy that underlies and informs the written provisions of the Constitution and that holds those provisions together in a comprehensive and coherent whole.

IV. *Why should judges fill the access gap in the Constitution instead of legislatures?*

Even after an access gap in the Constitution has been identified, the question remains: why should the judiciary fill the gap instead of the legislature? That question may seem particularly prescient in the case of access to government information in light of the fact that a motion to include the right in the Constitution was rejected by the Special Joint Committee in 1981.

At this stage it seems appropriate to distinguish between three different ways in which gaps may develop in the Constitution. A gap may develop in the first instance because the framers of the Constitution failed to foresee the development of circumstances that would necessitate constitutional protection of a right. In the second instance, a gap may develop because the constitutional framers recognized a potential threat but did not consider it necessary to implement explicit constitutional protection at the time. In both instances, a gap may develop over time because society and its governing processes have evolved beyond the ambit of the written provisions of the Constitution and the legislature has failed to update the written provisions of the Constitution.

In the third instance a gap may *appear* to exist because there is no express protection of a particular right, however the absence of protection is a result of a principled decision of the framers to exclude protection of a particular type of right. The best example of this is the decision not to protect property rights in the *Charter* discussed above. Application of unwritten constitutional principles to fill gaps in the constitutional text may be more easily justified in the first and second instances than in the third instance. Indeed, where a principled decision has been made to exclude

protection of a particular type of right in the Constitution it will be difficult to characterize the absence of protection as a gap at all.[52]

Despite the fact that the Special Joint Committee rejected a motion to include a right to access government information in the *Charter*, the protection of such a right was not rejected in principle, but rather, as noted in the statements of the acting Minister of Justice, was rejected as a practical matter. The government's stated position in 1981 was that a legislative regime should be put in place prior to entrenching a constitutional right to access. By contrast, the opposition to inclusion of a right to protection of private property was a principled objection. The access gap thus falls in the second category of constitutional gaps; it may be more difficult to justify the application of unwritten constitutional principles to fill the gap because the right was considered for inclusion in the text during the constitutional drafting process. However, justification of the application of the principle of democracy in this case is less difficult than it would be had the exclusion of an explicit right to access to government information been the result of a principled objection to its inclusion in the *Charter*.

What, then, is the argument that supports judicial application of the principle of democracy to fill the access gap in the Canadian Constitution? Another way to frame this question may be to ask: why not rely on our elected representatives to remedy any problems with access to government information? Interestingly, the argument that remedies for failures to protect access to government information should be left to the political process is one of the arguments used to reject recognition of a constitutional right to access in the cases identified at the beginning of this section. For example, Justice Adams, who delivered the unanimous decision of the Ontario Divisional Court (Justices Hartt and Then, concurring) in the *Fineberg* case, rejected Fineberg's argument "that a democratic government must be accountable to the people and information concerning its performance is essential to such accountability."[53] Rather, Justice Adams held that the system of political accountability provided the necessary accountability of the bureaucracy and government. In his view, elected officials hold the bureaucracy accountable and are, in turn, held accountable through elections. In addition, the opposition parties hold the government accountable by asking critical questions in the legislature and committees. He concluded that: "Against this tradition, it is not possible to proclaim

52. However, in light of the Court's suspicion of the statements of legislators and government officials such an exclusion may not be absolutely determinative.

53. *Fineberg*, *supra* note 12 at para. 16.

that s. 2(b) entails a general constitutional right of access to all information under the control of government ..."[54]

The main weakness of the approach adopted by Justice Adams is that it fails to explain how either the opposition or the electorate could effectively hold the government to account if they were insufficiently informed of what the government was actually doing. In other words, it may be impossible to rely on citizens to hold governments accountable through the political process where those citizens are denied access to sufficient information to consider and weigh the actions of government. This becomes particularly problematic where government itself is responsible for restricting access to the necessary information.

The primary argument in favour of judicial involvement in protecting a right to access government information is directly connected to the importance of access within the democratic process. One of the fundamental roles of the judiciary is to ensure the protection of our constitutionally mandated democratic process of governance.[55] The judiciary is tasked with enforcing constitutional limits on the exercise of legislative power. Nowhere can that role be more vital than where the legislature may seek to exercise its power to hinder the democratic process. Given the vital role that access to government information plays in ensuring the effectiveness of our democratic process, judges must be willing to prevent legislatures from unjustifiably limiting access to government information.

This recognition that courts must act to counterbalance illegitimate exercises of government power is at the heart of Choudhry and Howse's dualist theory of constitutional interpretation.[56] According to Choudhry and Howse, the courts may engage in extra-ordinary interpretation and legitimately apply unwritten constitutional principles as more than just interpretive aids in cases where the very legitimacy of the constitutional order is threatened. In their view, in such situations, it may not be practical to wait for the legislature to fill the constitutional gaps at issue. I would go further to argue that it may not be realistic to expect the legislature to fill

54. *Ibid.* at para. 19.

55. *Reference re Language Rights under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1 [*Manitoba Language Rights Reference* cited to S.C.R.] at 745.

56. Sujit Choudhry & Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 Can. J.L. & Jur. 143 at 156ff.

gaps in the text of the Constitution in cases where the government itself seeks to take advantage of the gap to undermine the democratic process.[57]

In this way, if we extend Choudhry and Howse's conception of extraordinary interpretation to focus on threats to the democratic process, as opposed to merely situational threats to the legitimacy of the constitutional order, we recognize that judges have an important role in filling gaps in the Constitution. This judicial role does not supplant the legislative role, but rather supplements it, particularly in cases where it is either not practical or not realistic to rely on the legislature to fill a gap in the text of the Constitution.

The absence of explicit protection of access to government information in the text of the Canadian Constitution is a gap in protection of the democratic process provided by the Constitution. As in the case of the *Provincial Judges Reference,* this gap has arisen because the development of the Canadian state and the process for governing it have outstripped the explicit scope of the written provisions of the Constitution. In particular, the growing expectations of access to government information in order to facilitate participation in the political process and to assist in maintaining accountability of government have outstripped the basic protections offered by sections 2(b) and 3 of the *Charter* (as they have been interpreted to date).

While the reluctance of government MPs to include explicit protection to access to government information in the *Charter* in 1981 must be acknowledged, that reluctance was based on an assumption that constitutional protection of such a right was desirable, but not yet timely. Twenty five years later, it may be said that the time for constitutional protection of access to government information has arrived. More importantly, in light of the possibility that government itself may benefit from preventing such constitutional protection, the judiciary has a legitimate and necessary (some may say extraordinary) role in filling the access gap in the Constitution through the application of the principle of democracy.

57. This type of 'representation-reinforcing', process-oriented, approach to constitutional interpretation has been advanced by a number of scholars in the context of American constitutional interpretation, most notably John Hart Ely in his book *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980). Although the application of Ely's approach provides one possible framework for understanding the role of courts in constitutional interpretation, its application in the Canadian context requires some adjustment for the British heritage of unwritten constitutionalism that informs the Canadian Constitution. A fuller discussion of this approach, though important, is beyond the scope of this article.

V. *How can the principle of democracy help to fill the access gap in the Constitution?*

The Supreme Court's most important discussion of the general role of unwritten constitutional principles may be found in the *Quebec Secession Reference*. In that case, the Court noted that the principle of democracy is best understood as a baseline against which the Constitution has always operated. The baseline, which includes the representative and democratic nature of Canada's political institutions, was not explicitly mentioned in the text of the *Constitution Act, 1867* because it was simply assumed to operate. Over time, the democratic baseline has been raised as Canada's "governing institutions have adapted and changed to reflect changing social and political values."[58] This evolution of Canadian democratic institutions, which has largely been the result of legislative action, has resulted in greater and more effective representation and, ultimately, the realization of universal adult suffrage.

Notably, the Court's discussion in the *Quebec Secession Reference* did not limit the democratic principle to procedural goals, but also recognized that democracy includes substantive goals, most importantly the promotion of self-government.[59] This substantive goal of self-government is achieved through rigorous protection of the democratic process. As such, the Court reaffirmed that the democratic process itself requires a continuous process of discussion to be effective. It also recognized that the democratic process must facilitate two aspects of political participation: participation in policy-making and the ability to hold accountable those who govern. In the Court's words, the legitimacy of our democratic institutions rests on their ability to "allow for the participation of, and accountability to, the people...".[60] Ultimately, the Court recognized, our democratic system "must be capable of reflecting the aspirations of the people."[61]

In short, the Supreme Court's discussion of the principle of democracy in the *Quebec Secession Reference* recognized the importance of protecting the democratic process in order to attain the substantive goal of self-governance. The results of the democratic process must ultimately reflect the aspirations of the people. At a minimum, within a democratic system, those aspirations include the ability to participate in the political system and to hold that system accountable. Access to government information

58. *Quebec Secession Reference, supra* note 16 at para. 33.

59. Other substantive goals include the respect for the rule of law and moral values that are embedded in the Canadian constitutional structure. The Court thus emphasized that the democratic principle should not be limited to the notion of majority rule.

60. *Quebec Secession Reference, supra* note 16 at para. 67.

61. *Ibid.*

facilitates, and in many cases ensures, meaningful participation within the political process, both in terms of participation in the process of policy development and in terms of holding government officials accountable. Protecting access to government information thus matches the fundamental objective of the principle of democracy—protecting those elements of the political process that are necessary to achieve self-governance. In the sections that follow, I will consider more specifically how the principle of democracy provides the foundation for constitutional protection of access to government information through the application of sections 2(b) and 3 of the *Charter*.[62]

Section 2(b) of the *Charter*

Much of the Supreme Court's discussion of the need to protect the democratic process has been triggered by cases concerning section 2(b) of the *Charter*. There are two important trends in the Supreme Court's s. 2(b) jurisprudence that merit our attention. First, the Court has repeatedly recognized that freedom of political speech was constitutionally protected prior to the entrenchment of the *Charter* and that the foundation of its constitutional protection is the role it plays in protecting the democratic process.[63] Second, in post-*Charter* cases, justices of the Supreme Court

62. A number of academics have traced and analyzed the Supreme Court's "electoral jurisprudence". For the most part, these academics have focused their attention on identifying and critiquing how the Court's jurisprudence reflects or reinforces an egalitarian rather than libertarian approach to protecting democratic rights. See, for example: Colin Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy Under the *Charter*: The Emerging Egalitarian Model" (1999) 44 McGill L.J. 5; Heather MacIvor, "Judicial Review and Electoral Democracy: The Contested Status of Political Parties Under the *Charter*" (2002) Windsor Y.B. Access Just. 479; Andrew Geddis, "Liberté, Egalité, Argent: Third Party Election Spending and the *Charter*" (2004) 42 Alta. L. Rev. 429; Christopher D. Bredt, and Markus F. Kremer, "Section 3 of the *Charter*: Democratic Rights at the Supreme Court of Canada" (2005) Nat'l J. Const. L. 19; Christopher Manfredi and Mark Rush, "Electoral Jurisprudence in the Canadian and U.S. Supreme Courts: Evolution and Convergence" (2007) McGill L.J. 457.

63. For example, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336, Justice Cory wrote:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

Similarly, in *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 763, Chief Justice Dickson recognized the important link between freedom of expression and the political process and the importance of freedom of expression in facilitating participation in the political process. He stated:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

have emphasized that the role of freedom of expression in protecting the democratic process extends beyond simply promoting open debate to ensuring that voters have sufficient information to ensure that their votes accurately reflect their preferences.

The Supreme Court of Canada has considered the specific ways in which freedom of expression supports the political process in a number of cases. In two early cases, *Haig v. Canada (Chief Electoral Officer)*[64] and *Libman v. Quebec*,[65] the Court considered claims of limitations on expression in the context of referenda. These early cases established the foundation for the Court's later decisions dealing with restrictions on expression in the context of elections. Notably, in *Libman,* the Court upheld restrictions on freedom of expression because those restrictions promoted voter equality by preventing the most affluent members of society from dominating debate during a referendum. In this way, the restrictions would help to ensure that voters were adequately informed prior to voting. The Court stated:

> Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties. Thus, the principle of

64. [1993] 2 S.C.R. 995, 105 D.L.R. (4th) 577 [*Haig*, cited to D.L.R.]. The *Haig* case emerged out of the referendum held in relation to the proposals to amend the Canadian Constitution contained in the Charlottetown Accord. The referendum was held pursuant to federal law across Canada, except in Quebec where the referendum was held pursuant to provincial law. The claimant Haig was a resident of Ontario who had recently moved to Quebec. As a result of differences in the residency requirements under the federal legislation and the Quebec legislation, Haig was denied the right to vote in either referendum. He challenged the federal *Referendum Act,* S.C. 1992, c. 30, claiming that, by excluding him from voting in the federal referendum, it violated his rights under sections 2(b), 3 and 15 of the *Charter.*

Justice L'Heureux-Dubé wrote the majority judgment. She found that the Order in Council requiring that a federal referendum be held in some, but not all provinces, was constitutionally valid. She concluded that section 3 of the *Charter* did not include a constitutional right to vote in a referendum. Justice L'Heureux-Dubé also found that there was no violation of section 2(b) of the *Charter* since the freedom of expression did not guarantee the provision of a specific means of expression, such as voting in a referendum. I will deal with the s. 3 aspect of her decision in the next section of the article. Justice L'Heureux-Dubé also rejected the claim based on section 15, but I will not address that part of her reasons in this article.

65. [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385 [*Libman*, cited to D.L.R.]. *Libman* concerned a challenge to certain provisions of Appendix 2 of Quebec's *Referendum Act,* R.S.Q., c. C-64.1. The complainant Robert Libman, the president of the Equality Party, claimed that the provisions, which required that certain types of regulated expenses, including advertising expenses, must be paid out of the funds of committees authorized to represent particular sides in a referendum in Quebec, violated sections 2(b) and 2(d) of the *Charter.* In effect the provisions required individuals to associate with one of two national committees on either side of a referendum question in order to incur regulated expenses during the course of the referendum campaign. If the individual wished to pursue a campaign independent of the two committees, then she could not incur any regulated expenses. The Court concluded that the provisions infringed s. 2(b) and s. 2(d) of the *Charter*, and that the infringement could not be justified under s. 1.

> fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy (Lortie Commission, *supra*, at p. 323). Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources. (Lortie Commission, *supra*, at p. 324).[66]

This notion of the right to an informed vote, be it in an election or a referendum, recurs in the cases dealing with both s. 2(b) and s. 3 of the *Charter* that will be discussed below.[67]

Thomson Newspapers Co. v. Canada (Attorney General)

The important role of s. 2(b) in protecting access to information necessary to promote 'informed' voting was again underlined in *Thomson Newspapers Co. v. Canada (Attorney General)*.[68] *Thomson Newspapers* involved a challenge to s. 322.1 of the *Canada Elections Act*,[69] which banned the broadcasting, publication or dissemination of opinion polls during the final 72 hours of an election campaign.

Both the majority and dissenting judgments in the case agreed that it was vital to protect access to political information, in this case polling results, in order to ensure that voters could make informed choices on election day. However, the majority and dissent disagreed on the central issue of whether the ban on polling results enhanced or restricted access to this type of political information. Justice Bastarache, writing for the majority, found that the provision violated s. 2(b) of the *Charter* and that the violation could not be saved under s. 1.[70] His section 1 analysis focused

66. *Ibid.* at 410.

67. In *Libman*, the Court found that some limitations on expression could be justified in order to ensure fair votes in referenda or elections. However, the Court concluded that the spending restrictions on third parties, which amounted to an almost complete ban, were not minimally impairing of the right to expression and association. The Court found that allowing individuals and groups who could neither join nor affiliate themselves with the national committees a minimum amount of money that they could spend to communicate their positions would have provided a less intrusive means of achieving the legislation's stated objective. It struck down the impugned provisions.

68. [1998] 1 S.C.R. 877, (1998), 159 D.L.R. (4th) 385 [*Thomson Newspapers*, cited to D.L.R.].

69. R.S.C. 1985, c. E-2.

70. It is worth noting that Justice Bastarache found that it was unnecessary to determine whether the provision violated s. 3 of the *Charter*. Nonetheless, Justice Bastarache opined that "to constitute an infringement of the right to vote, a restriction on information would have to undermine the guarantee of effective representation." *Thomson Newspapers, supra* note 68 at 427. Justice Gonthier, writing in dissent, found that the ban did not violate s. 3 of the *Charter*. He explicitly agreed with Justice Bastarache that section 3 could only be violated by a restriction on information if it undermined the guarantee of effective representation. He concluded that the provisions in issue did not have such an effect, but rather assisted effective representation by allowing voters enough time to scrutinize and discuss published poll results before election day. As such, he found no violation of s. 3 of the *Charter*.

on the damage inflicted to the flow of political information in the electoral process by banning access to polling results. For example, when weighing the detrimental effects of the ban, Justice Bastarache stated:

> The impact on freedom of expression in this case is profound. This is a complete ban on political information at a crucial time in the electoral process. The ban interferes with the rights of voters who want access to the most timely polling information available, and with the rights of the media and pollsters who want to provide it. It is an interference with the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them...[71]

In his dissenting reasons, Justice Gonthier agreed with Justice Bastarache that the ban on the publication of opinion polls in the last 72 hours of an election campaign infringed s. 2(b) of the *Charter*. However, contrary to Justice Bastarache, Justice Gonthier found that the ban protected voters from receiving *false* information by ensuring there was enough time to refute inaccurate polls released close to the election day.[72] Justice Gonthier concluded that the ban on the publication of polling results thus enhanced the purpose of the freedom of expression itself, including "the ability of voters to make *informed* choices and the promotion of political and social participation..."[73] Justice Gonthier found that there were no equally effective alternatives to the ban and that the limited effect of the 72-hour ban was outweighed by the positive impact of ensuring that voters are properly informed when voting. He concluded that the infringement of s. 2(b) could be justified under s. 1.

Harper v. Canada (Attorney General)

The notion that the freedom of expression includes a right to receive certain information was also a key to the decision in *Harper v. Canada (Attorney General)*.[74] The *Harper* case involved a challenge to spending limits included in the *Canada Elections Act*,[75] which limited the spending of individuals and groups on advertising during an election. The challenge

71. *Ibid.* at 454.
72. *Ibid.* at 403-404. Justice Gonthier stated:
> The quest for better information gives more meaning to voter participation in the electoral process. The very fact that some voters base their decision on opinion survey polls may justify the means taken to promote voters' right to good information. This is consistent with the findings of this Court that one of the objectives underlying freedom of expression is the ability of voters to make informed choices (Libman, supra, at para 54; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at p. 767, 54 D.L.R. (4th) 577).

73. *Ibid.* at 410.
74. [2004] 1 S.C.R. 827, 239 D.L.R. (4th) 192 [*Harper*, cited to D.L.R.].
75. S.C. 2000, c. 9.

was launched by Stephen Harper, then the head of the National Citizens Coalition, now the Prime Minister of Canada. He argued that the provisions, which restricted individuals and groups, not including political parties, from spending more than $3,000 in any individual electoral district and $150,000 nationally on advertising during an election, violated sections 2(b), 2(d) and 3 of the *Charter*.

All of the judges who heard the appeal agreed that the impugned provisions did not infringe the right to vote. The judges also agreed that the impugned provisions infringed s. 2(b) of the *Charter*. The majority found that the infringement could be justified under s. 1, while the dissenting judges found that the infringement created by two of the provisions could not be justified under s. 1.[76] Once again, the division between majority and dissenting judges revolved around the best way to ensure access to sufficient information to protect the ability of citizens to make informed choices when voting. Justice Bastarache, writing for the majority, emphasized an 'egalitarian model' of the electoral process that "requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power."[77] This egalitarian model ultimately justified the infringement of s. 2(b) created by the limits on third party spending because the limits created a 'level playing field' for those wishing to enter the electoral debate and thereby ensured access to better information. In Justice Bastarache's words, the spending limit "enables voters to be better informed; no one voice is overwhelmed by another."[78]

The dissenting judges, Chief Justice McLachlin and Justice Major, shared Justice Bastarache's concern with ensuring that voters have sufficient information to make informed choices. They reiterated the Court's position that the right to participate in political discourse included a right to effective participation, which required, in turn, access to sufficient

76. At present, I will focus on the discussion of the freedom of expression in the dissenting reasons. I will examine the discussion of s. 3 of the *Charter* in the majority reasons in the next section.

77. *Harper, supra* note 74 at 226.

78. *Ibid.* at 226-227.

information.[79] Indeed, they held that the freedom of expression includes a right to receive the information necessary to exercise an informed vote.

> Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public – as viewers, listeners and readers – have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal, supra*, at pp. 1339-40.[80]

According to the Chief Justice and Justice Major, the *Canada Elections Act* undermined the right to listen by withholding from voters the substantive analysis and commentary on political issues that is critical to their individual and collective deliberation.[81] The dissent concluded that the violation of freedom of expression could not be justified under s. 1 of the *Charter*.

All of the judgments in both *Harper* and *Thomson* recognized that one of the primary purposes of s. 2(b) of the *Charter* is to protect the right to an informed vote, which includes the right to receive the information necessary to make the right to vote meaningful. While the judgments in these cases focused on the right to receive information concerning the political opinions or political analysis of non-state actors, it is not difficult to apply the same logic to support an argument in favour of access to information concerning what the government is doing. Indeed, in the quest to promote informed voting, information concerning what the government is doing is at least as necessary as access to the opinions of others concerning political issues. Government information is often the raw material upon which such opinions may be formed. If so, how can access to opinions be protected if access to information is not?

In summary, the Supreme Court of Canada has recognized that a fundamental requirement of Canadian democracy is that voter preferences are accurately reflected in the ballots cast to select legislative representatives. While the judges of the Supreme Court have been divided

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79. *Ibid.* at 205. The Chief Justice and Justice Major stated:
The right to participate in political discourse is a right to effective participation – for each citizen to play a "meaningful' role in the [illegible]nocratic process, to borrow again from the language of Figueroa, supra. In Co[illegible]or the Commonwealth, supra, at p. 250, McLachlin J. stated that s. 2(b) aspi[illegible]the interest of the individual in effectively communicating his or her messa[illegible]e to members of the public" (emphasis added). In the same case, Lamer C.J. declared that "it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say" (emphasis added); see Committee for the Commonwealth, supra, at p. 154.

80. *Ibid.* at 206.

81. *Ibid.*

about the best mechanisms for ensuring access to the information necessary to promote informed voting, the Court has been united in its recognition of the importance of access to information to ensure meaningful participation in the electoral process. Even in those cases where members of the Court have been willing to accept limits on expression they have done so to protect the *quality* of information available to voters, in furtherance of the ultimate goal of protecting access to that information necessary to ensure that voters can make informed choices.

The existing jurisprudence thus provides a strong foundation for the extension of *Charter* protection of freedom of expression to include protection of access to government information. Democracies cannot function unless voters are allowed to discuss, debate, and criticize political issues, policies and government behaviour. However, the right to expression may be rendered meaningless without access to information concerning what the government is actually doing. Our right to talk is an empty one unless we have something to talk about.

There remains one important doctrinal obstacle to the protection of access to government information through section 2(b) of the *Charter*. This obstacle is the Supreme Court's finding that s. 2(b) should not be interpreted to impose positive obligations on government except in exceptional circumstances. Thus, for instance, in *Haig*, Justice L'Heureux-Dubé concluded that there was no positive obligation on government to ensure that citizens could express their views in any given referendum.[82] As a result, the exclusion of a particular citizen's right to vote in a consultative process such as a referendum was not a violation of the freedom of expression. She reached this conclusion based on the fact that it had not yet been determined that s. 2(b) of the *Charter* obliged the government to provide "a *particular platform* to facilitate the freedom of expression."[83]

82. *Haig, supra* note 64 at 603. Her finding that that the freedom of expression did not include a right to vote in a referendum was based on her view that the *Charter*'s fundamental freedoms, such as the right to freedom of expression protected by section 2(b) of the *Charter*, are traditionally conceived as involving only a negative obligation not to restrict the right in question.

83. *Ibid.* at 604.

This interpretive rule was relied upon by Justice Blair in the Ontario Divisional Court's decision in the *Criminal Lawyers' Association* case.[84] As noted earlier, the *Criminal Lawyers Association* case concerned the attempts by the CLA to obtain access to documents related to an investigation by the Ontario Provincial Police. The investigation concerned the behaviour of police officers and Crown officials in a high-profile murder case in the 1990s. In an attempt to get more information concerning the OPP investigation, the CLA requested disclosure of documents related to the investigation and its report, pursuant to *FOIPPA*.[85] As part of its challenge against the refusal of the government to disclose documents relevant to its request, the CLA argued that section 2(b) protects a right to access government information.

Relying on Justice L'Heureux-Dubé's findings in *Haig,* Justice Blair held that section 2(b) should not be interpreted in a way that imposes a positive obligation on government to provide access to government information. The general rule, he noted, is that there is no positive obligation on government to facilitate expressive activity or to make expression more effective. Justice Blair found that the CLA was not barred from expressing its opinions in the *Criminal Lawyers Association* case, but rather that the effectiveness of its expression was hindered by the failure to disclose the requested documents.[86]

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84. Justice Blair's decision was overturned by the Ontario Court of Appeal: *Ontario Criminal Lawyers Association v. Ontario (Public Safety and Security),* 2007 ONCA 392, 280 D.L.R. (4th) 193, leave to appeal to S.C.C. granted, [2007] S.C.C.A. No. 382. Unfortunately, Justice LaForme's majority reasons in the Court of Appeal decision failed to adequately address the major objections to the recognition of a constitutional right to access government information. Notably, the dissenting reasons of Justice Juriansz repeat many of the points raised by Justice Blair at the Divisional Court. Justice Juriansz gives particular weight to the decision of the Special Joint Committee to reject an entrenched right to access government information and to the prevailing attitude that section 2(b) should not be interpreted to impose positive obligations except in the rarest of circumstances. (Paras. 107-119, 125-138).

85. The Ministry of the Solicitor General – now the Ministry of Public Safety and Security – found three documents relevant to the CLA's request for information: a 318 page police report, a 12 March 1998 memorandum and a 24 March 1998 letter related to the investigation. However, the Ministry refused to disclose any of the documents. The Ministry justified its refusal to disclose the 318 page report by arguing that the report was a "law enforcement record" and thus subject to its discretion to refuse disclosure pursuant to section 14 of *FOIPPA*. It further argued that the memo and letter were protected by solicitor-client privilege and thus subject to its discretion to refuse disclosure pursuant to s. 19 of *FOIPPA*. The CLA appealed the decision of the Ministry to the Assistant Commissioner of the Office of the Information and Privacy Commissioner of Ontario. The Assistant Commissioner upheld the decision of the Ministry, finding that the documents fell under the discretionary exemptions to disclosure in sections 14, 19, and 21 of the Act, respectively. He further determined that, despite the fact that there existed a "compelling public interest" in the disclosure of the documents, the documents could not be disclosed because sections 14 and 19 of the *Act* are not subject to the public interest override otherwise available under section 23 of the *Act*.

86. *Ibid.* at para. 65.

In my view, Justice Blair's analysis confused effectiveness with meaningfulness. Admittedly, the Supreme Court of Canada has doubted whether s. 2(b) imposes an obligation on governments to enhance the effectiveness of expression through, for instance, distributing megaphones. Recall that in *Haig,* Justice L'Heureux-Dubé framed this argument, writing: "The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones."[87]

It is useful to pause here to unpack the metaphor used by Justice L'Heureux-Dubé. The distribution of megaphones mentioned by Justice L'Heureux-Dubé would improve the effectiveness of communication by ensuring that any communication would be heard by more people because of the augmented volume provided by the megaphone. Alternatively, the distribution of megaphones would facilitate expression by making it easier to communicate with a given number of people by eliminating the need for the speaker to shout, for example.

The Court's finding that governments do not have an obligation to either *facilitate*, or *magnify the volume* of, expression must be contrasted with its recognition that, in some circumstances, governments may be under a positive obligation to ensure the *meaningfulness* of expression. This potential obligation was also recognized by Justice L'Heureux-Dubé in *Haig*, where she stated:

> Under this approach, a situation might arise in which, in order to make a fundamental freedom *meaningful*, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring access to certain kinds of information.[88]

Justice L'Heureux-Dubé thus explicitly recognized that access to certain kinds of information may be necessary to support the *meaningfulness* of expression as opposed to facilitating expression or increasing its volume. In the *Criminal Lawyers Association* case, the applicants sought access to the records in issue in order to render their expression meaningful, not in order to facilitate that expression or to magnify its volume. In other words,

87. *Haig, supra* note 64 at 604 [emphasis in original].
88. *Ibid.* at 607 [emphasis added].

without the information they sought, the CLA could not meaningfully comment on the report issued by the police.[89]

In my view, Justice Blair erred in finding that the plaintiffs' claim that s. 2(b) included a right to the information sought in the *Criminal Lawyers Association* case should be dismissed because it amounted to an attempt to impose an obligation on the government to increase the effectiveness of their expression.[90] Justice Blair's s. 2(b) analysis was flawed in so far as it portrayed access to government information as a means of rendering expression more effective rather than as a means of rendering it meaningful.

Blinkered by the formal requirements of s. 2(b) analysis and convinced that s. 2(b) should not result in positive obligations being placed on the government, Justice Blair's analysis was unable to make the link between expression and access to government information despite the fact that he repeatedly recognized the important role of access to government information in the democratic process.[91] This failure of Justice Blair's analytical approach serves as an important lesson. Engaging the fundamental principle of democracy in the process of interpreting s. 2(b) requires an acknowledgement of the foundational role of freedom of expression in ensuring meaningful participation in the democratic process. Such an acknowledgement should render it much more difficult to ignore the link between access to information and freedom of expression.

Ultimately, the importance of access to government information to the democratic process is such that it fits within the category of "exceptional circumstances" that allow for the imposition of positive obligations on

89. Interestingly, in his reasons, Justice Blair, like Justice L'Heureux-Dubé, also allowed for the possibility that, in some cases, a positive obligation may arise. Justice Blair opined that such a positive obligation would only arise where there was a complete suppression of expression. *Criminal Lawyers Association* (Div. Ct), *supra* note 15 at para. 61.

90. Nonetheless, Justice Blair may have been correct in concluding that a potential violation of s. 2(b) of the *Charter* could be justified under section 1. The exclusion of access to information in criminal investigations may be justified in certain circumstances in a free and democratic society. However, it is worth noting that the information sought in the *Criminal Lawyers Association* case did not pertain to an ongoing criminal investigation and thus the arguments for restricting its disclosure are less convincing.

91. Interestingly, in considering the section 1 analysis, Justice Blair specifically noted the importance of access to information to the democratic process. *Criminal Lawyers Association* (Div Ct), *supra* note 15 at para. 24. Justice Blair stated:

> There can be little debate, in my view, that the objectives of the Legislature in enacting the scheme to ensure that government information is more readily accessible to the public, subject to limited and specific necessary exceptions as set out in the Act "relate to concerns that are pressing and substantial in a free and democratic society". Greater accessibility to such information – promoting as it does, greater transparency and accountability in government – is responsive to important principles underlying our democratic society, as the authorities referred to us by the Applicant demonstrate. [emphasis added].

the government through s. 2 of the *Charter*. One approach by which such an exceptional circumstance may be identified was set out by Justice Rothstein in his majority decision in *Baier v. Alberta*.[92] In particular, Justice Rothstein noted that where a positive entitlement is claimed under s. 2(b), the claimant must establish three factors:

> (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom...[93]

In my view, access to government information plays such an important role in ensuring that citizens can make informed choices when voting and more generally participating in the political process that it must be considered to lie at the core of s. 2(b)'s mission to protect meaningful political participation. As such, claims for protection of access to government information transcend mere claims of access to the statutory platforms for access. Finally, government-imposed limitations on access that constrain meaningful participation in the political process represent substantial interferences with the core mission of s. 2(b). In light of this, imposition of a positive obligation to provide access to government information through s. 2(b) of the *Charter* is readily justified.[94]

Section 3 of the *Charter*

While a strong argument may be advanced for protection of access to government information through section 2(b), an even stronger argument may be made for protection of access through the right to vote protected by s. 3 of the *Charter*. The right to vote stands at the heart of the democratic process. Without it, there can be no claim to democratic legitimacy. In Canada, the Supreme Court of Canada has developed a highly substantive conception of the right to vote that is based on the importance of meaningful participation of citizens in the democratic process.

92. 2007 SCC 31, [2007] 2 S.C.R. 673. I am not convinced that this approach is entirely coherent or viable, however, for the purpose of this article, it suffices to apply the approach without critical analysis.

93. *Ibid.* at para. 30.

94. I note that it is also arguable that restrictions on access to government information are limitations on access to information that belongs to the people, and as such access may be characterized as a negative liberty. However, I will not explore this argument in detail in this article.

The Supreme Court's existing jurisprudence supports the application of section 3 to protect a right to access government information in three ways. First, the Court's jurisprudence reinforces an approach to the interpretation of democratic rights that stresses the evolution of democratic norms and institutions over time. Second, the Court's s. 3 jurisprudence strengthens the notion that the Constitution protects the right of Canadians to meaningfully participate in the democratic process. Applying a purposive approach to interpretation, the Court has found that the right to vote means more than simply marking a ballot in an election, but includes a right to meaningful participation in the Canadian political process. Indeed, the Court's conception of meaningful participation includes a right to a minimum amount of information necessary to reflect the actual preferences of voters. Finally, the Court's s. 3 jurisprudence reinforces the understanding that the selection of representatives involves decisions concerning the effectiveness of governance and the functioning of political institutions in addition to decisions concerning policy choices.

Ref. re: Electoral Boundaries Commission Act, ss. 14, 20 (Sask.)

The Supreme Court of Canada's process of defining the scope of the right to vote began with a case concerning the proper size of electoral constituencies, the *Saskatchewan Electoral Boundaries Reference*.[95] As this was the first case in which the Supreme Court had to deal with s. 3, Justice McLachlin began her majority decision with a discussion of the proper method of interpreting *Charter* rights. As part of this discussion, Justice McLachlin discussed the role of historical conceptions of rights on

95. *Saskatchewan Electoral Boundaries Reference*, *supra* note 19. The case concerned revisions to the electoral boundaries for the Province of Saskatchewan established by the *Representation Act, 1989*, S.S. 1989-90, c. R-20.2. In particular, the Court was asked to determine whether the distribution of constituencies and the variance in population between constituencies allowed by the *Act* violated s. 3 of the *Charter*. The *Act* mandated the creation of a fixed distribution of constituencies: 29 urban, 31 rural and 2 northern. As a result of the redistribution of constituencies, rural constituencies tended to have smaller populations than urban constituencies. Under the *Act* population variances of up to 25 percent from the provincial quotient were permitted in southern constituencies and up to 50 percent in the northern constituencies.

Justice McLachlin (as she then was) wrote the majority judgment for the Supreme Court. Justice McLachlin held that the variance in constituency size allowed by the *Act* did not infringe s. 3. She concluded that the purpose of section 3 was not to ensure equality of voting *per se*, but rather to ensure "effective representation". Ensuring effective representation required consideration not just of parity of voting power, but also consideration of factors such as geography, community history, community interest and minority representation.

contemporary constitutional interpretation. She rejected the notion that our understanding of rights must be frozen in a particular historical context.[96]

Justice McLachlin also recognized the primary importance of interpreting rights in light of the democratic context upon which they are based: "Of final and critical importance to this appeal is the canon that in interpreting the individual rights conferred by the Charter the Court must be guided by the ideal of a "free and democratic society" upon which the Charter is founded."[97] Finally, Justice McLachlin reiterated her contention in *Dixon v. British Columbia (Attorney General)* that the Canadian tradition is one of "evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation..."[98]

Justice McLachlin's discussion of the method of interpreting section 3 thus reinforced the fact that the principle of democracy in general, and democratic rights in particular, though historically rooted, must be understood as evolving over time. As noted earlier, this view was supported by the entire court in the *Quebec Secession Reference*. This notion of evolutionary democracy and the rejection of a frozen definition of democratic rights is key to understanding how the interpretation of democratic rights in Canada may be expanded over time to include a right to access government information even though such a right was not explicitly included in the text of the *Charter* in 1982. A parallel may be drawn to the way in which the modern conception of the requirements of effective democracy have changed over time from one based on a franchise restricted, in large part, to able-bodied, white, property-owning males to one that includes all adult citizens. In the same way, our conception of the requirements of democratic governance has changed over time to include a greater appreciation of the necessity of access to government information to ensure the effectiveness of representative government.

Justice McLachlin also provided a useful description of "representative democracy":

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96. *Ibid.* at 32-33. Justice McLachlin stated:
> The doctrine of the Constitution as a living tree mandates that narrow technical approaches are to be eschewed: Law Society of Upper Canada v. Skapinker (citations omitted)... It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future...
>
> The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy which is capable of explaining the past and animating the future.

97. *Ibid.* at 33.

98. *Ibid.* at 37.

> Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in *Dixon v. British Columbia (Attorney General)* (1989) 59 D.L.R. (4th) 247 at pp. 265-6, [1989] 4 W.W.R. 393, 35 B.C.L.R. (2d) 273 (S.C.) elected representatives function in two roles – legislative and what has been termed the "ombudsman role".[99]

The dual role of representation identified by Justice McLachlin reflects the understanding that citizens have a right not just to participate in the formation of public policy but also to raise comments and concerns regarding the functioning of government institutions. Again, the ability to raise such concerns is dependent on our access to information relating to the functioning of those government institutions. The need for such access has intensified over time as the scope of government activity has expanded and become more complex.

Haig v. Canada (Chief Electoral Officer)

The Supreme Court further considered the right to vote and the meaning of the right to "effective representation" under s. 3 of the *Charter* in *Haig v. Canada (Chief Electoral Officer)*. As noted above, the *Haig* case concerned a claim that provisions in the federal *Referendum Act* that excluded certain persons from voting in a federal referendum violated his rights under sections 2(b), 3 and 15 of the *Charter*.

In her majority judgment Justice L'Heureux-Dubé concluded that section 3 of the *Charter* did not include a constitutional right to vote in a referendum.[100] She found that the right to vote itself did not extend beyond the right to vote in "elections of representatives of the federal and provincial legislative assemblies."[101] Nonetheless, she highlighted the fact, identified by Justice McLachlin in the *Saskatchewan Electoral Boundaries Reference*, that the interpretation of the right to vote must consider the democratic context that is its foundation. In her view, "in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state."[102] As such, her analysis of the right to vote was informed by the principle of democracy, which includes the recognition of a right

99. *Ibid.* at 35.

100. I dealt with Justice L'Heureux-Dubé's reasons concerning s. 2(b) of the *Charter* above. I will deal with her treatment of s. 3 in this section.

101. *Haig, supra* note 64 at 600.

102. *Ibid.*

to effective representation. According to Justice L'Heureux-Dubé, the right to effective representation protected by section 3 of the *Charter* includes the right to play a *meaningful* role in the selection of elected representatives.[103]

Justice L'Heureux-Dubé also noted that the democratic rights enshrined in sections 3-5 of the *Charter* impose positive obligations on governments to hold elections.[104] This is significant in the context of access to government information because, as noted earlier, providing access to government information is often portrayed as requiring the state to accept positive obligations. Without conceding that a right to access government information should be characterized as a positive obligation, recognizing a right to access government information as part of s. 3 would avoid the argument against imposing positive obligations on government through s. 2(b) of the *Charter.*

Figueroa v. Canada

Justice L'Heureux-Dubé's concept of a right to meaningful participation in the electoral process was further developed in *Figueroa v. Canada.*[105] *Figueroa* concerned a challenge to the *Canada Elections Act*[106] by the leader of the Communist Party of Canada. In particular, Figueroa challenged the provisions of the *Act* that prohibited candidates from parties that failed to field 50 candidates in a federal election from issuing tax receipts outside of the election period, transferring unspent election funds to their party (rather than remitting them to the government) and listing their party affiliation on the election ballot.[107] He argued that the provisions violated sections 2(b), 3 and 15 of the *Charter.*

All nine members of the Supreme Court of Canada agreed that the provisions infringed section 3 of the *Charter* and that the infringement could not be justified under section 1.[108] Justice Iacobucci noted at the outset of his majority reasons that the appeal raised "fundamental questions

103. *Ibid.* Justice L'Heureux-Dube stated:
> The purpose of s. 3 of the Charter is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

104. *Ibid.* at 601.
105. [2003] 1 S.C.R. 912, 227 D.L.R. (4th) 1 [*Figueroa*, cited to D.L.R.].
106. *Canada Elections Act, supra* note 69.
107. *Ibid.*, ss. 24(2), 24(3), 28(2).
108. The majority decision written by Justice Iacobucci and concurred with by five other judges, differed from the minority, written by Justice LeBel, over the precise method of interpreting section 3, but not in the result. I will focus here on the reasons of the majority.

in respect of the democratic process in our country."[109] He noted, however, that the right to effective representation protected by s. 3 extends beyond simply voting to include the right of each citizen to play a meaningful role in the electoral process.[110] In particular, Justice Iacobucci held that section 3 guaranteed a certain level of participation - meaningful participation - in the electoral process, rather than a specific type of electoral outcome.[111] He found that participation in the electoral process had intrinsic value independent of the impact of that participation on the actual outcome of the election.[112] This value was related to the importance of different perspectives and opinions in enriching the political debate that is the lifeblood of an open society.[113] Justice Iacobucci's majority reasons thus advanced the proposition that democratic rights should be interpreted so as to enhance the quality of democracy in Canada. This suggests that the important link between access to government information and democratic participation and democratic accountability should play an important role in the interpretation of the Constitution in general and the right to vote in particular.

Justice Iacobucci emphasized that elections are important as the primary means by which average citizens participate in political debate and the determination of social policy.[114] He also noted that the right to meaningful participation included both a right to comment on the formation of policy and the right to comment on the functioning of public institutions.[115] Justice Iacobucci reiterated this point later when discussing the role of political parties in the Canadian political system:

> In respect of their ability to act as an effective outlet for the meaningful participation of individual citizens in the electoral process, the participation of political parties in the electoral process also provides

109. *Figueroa, supra* note 105 at 9.

110. *Ibid.* at 19.

111. *Ibid.* He stated:

> On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state.

112. *Ibid.* at 20.

113. *Ibid.* at 19-20. Justice Iacobucci stated: "Defining the purpose of s. 3 with reference to the right of each citizen to meaningful participation in the electoral process, best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country."

114. *Ibid.* at 20-21.

115. *Ibid.* at 21. Justice Iacobucci stated : "In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process."

> individuals with the opportunity to express an opinion on governmental policy and the proper functioning of public institutions.[116]

Justice Iacobucci concluded that the purpose of section 3 was not limited to ensuring the participation in the electoral process but also extended to the right to participate in the larger political process of the country: "Absent such a right, ours would not be a true democracy."[117]

Justice Iacobucci's majority reasons in *Figueroa* reinforced the conception that section 3 includes a right to meaningful participation in the electoral process in particular and in the political process more generally. Justice Iacobucci specifically identified the importance of access to information in order to render participation in the electoral process meaningful. In his view, without access to sufficient information concerning the candidates, citizens could not ensure that their votes reflect their preferences.[118]

Justice Iacobucci's recognition of the necessity of access to information concerning political candidates in order to ensure that citizens may exercise their right to vote in a manner that accurately reflects their preferences applies equally to the necessity of access to information concerning government activity. The fact that access to government information may be necessary in certain circumstances in order to ensure that the actual preferences of citizens are reflected when they vote, particularly when they use their votes to pass judgment on issues of governance and the functioning of political institutions, thus offers strong support for the protection of a constitutional right to access government information under section 3 of the *Charter*.

116. *Ibid.* at 26.

117. *Ibid.* at 21.

118. *Ibid.* at 30. Justice Iacobucci stated:

> The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party, voters must have access to information about each candidate. As a consequence, legislation that exacerbates a pre-existing disparity in the capacity of various political parties to communicate their positions to the general public is inconsistent with s. 3. This, however, is precisely the effect of withholding from political parties that have not satisfied the 50-candidate threshold the right to issue tax receipts for donations received outside the election period and the right to retain unspent election funds. By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.

Harper v. Canada (Attorney General)

The content of the right to effective representation under s. 3 of the *Charter* was further explored in *Harper v. Canada (Attorney General)*. As noted above, the *Harper* case involved a claim that spending restrictions on citizens and groups during the course of an election campaign violated sections 2(b), 2(d) and 3 of the *Charter*.

Justice Bastarache, writing for the majority, noted at the outset of his reasons that "the right to free expression and the right to vote are distinct rights."[119] He rejected the argument that the right to meaningful participation included a right to unimpeded and unlimited electoral debate and expression. He recognized that the s. 3 right to vote included a right to meaningful participation in the electoral process and indeed meaningful participation in the political process. The salutary effects of such participation were also recognized: "Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy."[120] This reinforces the position adapted by Justice Iacobucci in *Figueroa* that democratic rights should be interpreted so as to increase the effectiveness of the democratic process.

Justice Bastarache noted that the issue raised in the *Harper* case was the right of the citizen to exercise their vote in an informed manner.

> This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well-informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices": *Libman*, at para. 47.[121]

Justice Bastarache held that, in order to protect the right to an informed vote, there had to be limits on the information disseminated by third parties, candidates and political parties. In particular, he found that spending limits ensured that affluent individuals or groups pooling their resources would not dominate the political discourse. He concluded that equality in the political discourse thereby promoted the right to vote, while an

119. *Harper, supra* note 74 at 228.
120. *Ibid.* at 229.
121. *Ibid.*

unlimited right to convey information or opinions may undermine that right.[122] Nonetheless, Justice Bastarache did recognize that limitations on access to information may infringe the right to vote in circumstances where those limitations undermined the right to meaningfully participate in the electoral process. In his words: "To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented."[123]

The argument I am proposing is that the right to meaningfully participate in the political process requires not just access to information provided by political parties, but also access to information concerning the actions of government; this follows from Justice Iacobucci's discussion in *Figueroa*. Without such information, citizens cannot adequately weigh the strengths and weaknesses, or more appropriately, the positives and negatives of government policies and practices.

The Supreme Court has repeatedly identified the requirement that citizens have adequate information to make informed choices when voting and otherwise participating in the political system. The ability of voters to make "informed" choices is necessary to ensure that the choices made reflect the actual preferences of voters. If voters' choices don't reflect their actual preferences then the democratic process becomes seriously undermined. Although the Court has not yet explicitly linked the need to have adequate information to make informed choices when voting to a right to access government information, the linkage is easily made.

Recall that the Supreme Court has identified two primary focuses of voter choice and participation in the democratic process: policy and governance. In the first instance, voters make choices concerning policy options provided by particular candidates or political parties; they may also seek to participate in the formation of government policy. In the second instance, voters may also make choices concerning issues of governance, including the performance of government institutions and the behaviour of government officials. Discussion and debate concerning policy options may be possible, at a basic level, when relying simply on the publications and pronouncements of political parties and candidates for political office

122. *Ibid.* at 230. He stated:

> In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent's submission, s. 3 does not guarantee a right to unlimited information or unlimited participation.

123. This had been noted by both the majority reasons of Bastarache and the dissenting reasons of Justice Gonthier in *Thomson Newspapers*.

since parties and candidates have some interest in providing sufficient information to convince voters to select them based on that information. The sincerity of the information provided may be suspect, of course, however voters will be able to hold the parties or candidates accountable in a future election for their failure to fulfill campaign promises concerning policy issues. More meaningful participation requires accurate and detailed information.

Discussion and debate concerning the functioning and performance of government institutions is not possible, at even a basic level, without a right of access to government information since it is precisely access to information concerning failures in administration or misbehaviour of government officials that is likely to be denied. It would be virtually impossible for voters to make informed choices concerning the performance of a government without access to information concerning the government's behaviour. In the absence of such information, it is possible, indeed likely, that voter choices concerning issues of governance and institutional performance (namely a choice of whether or not to re-elect a governing party or candidate) will fail to reflect the actual preferences of voters. As such, restrictions on access to government information may indeed undermine the rights of citizens to meaningfully participate in the political process and to be effectively represented. Such restrictions should constitute infringements of the right to vote protected by section 3 of the *Charter*.

VI. *Hypothetical scenario: applying the* Charter *to protect access to cabinet confidences*

To this point, I have largely focused on the arguments in favour of recognizing a constitutional right to access government information through application of the principle of democracy in the process of constitutional interpretation. However, it is important to recognize that there are important values and interests that must be considered and weighed against the right of access to government information. In this regard, it is notable that all of the legislative access regimes in Canada include important limitations on access to certain types of government information, such as information concerning national security, national defence, different aspects of the policy-making process and individual privacy. Indeed, the legitimacy of such limitations is generally accepted (to varying degrees) by most access advocates.

Certainly, I would also agree that a constitutional right to access protected by the *Charter* would have to accommodate certain legitimate limitations. Indeed, in my view, a *Charter* right to access would most

likely accommodate the majority of existing statutory limitations on access to government information. Perhaps the best way to demonstrate how such a *Charter* right may recognize such legitimate limitations is to consider how such a right may be applied to a specific legislative provision. In this section, then, I will consider a hypothetical scenario in which legislation restricting access to government information may be challenged for violating the right to access I have argued is embedded within sections 2(b) and 3 of the *Charter*. In particular, I will focus on how an infringement on the proposed right to access may be justified under section 1 of the *Charter*.[124]

One hypothetical scenario where legislation restricting access to government information may be challenged for violating a constitutional right to access government information arises out of the mandatory exemption of Cabinet confidences from disclosure under the *Ontario Freedom of Information and Protection of Privacy Act*.[125] Section 12 of *FOIPPA* requires that government officials must refuse to disclose records

124. For the purpose of this article, I will not engage in any discussion of the level of deference to be accorded to the government in the analysis or the types of evidence required to support the section 1 argument.

125. *Supra* note 12.

that would reveal the substance of Cabinet deliberations unless the record is 20 years old or Cabinet consents to its disclosure.[126]

The first consideration when assessing whether a legislative provision restricting access to information violates the proposed constitutional right of access to information is whether access to the information at issue is protected by either section 2(b) or section 3 of the *Charter*. Arguably, the scope of access protected may differ depending on the *Charter* provision relied upon. I have argued that the *Charter* should be interpreted to protect a right to access government information that is necessary to allow citizens to engage in meaningful participation in the political process. We have seen that the Supreme Court's section 3 jurisprudence indicates that meaningful participation in the political process must at least include the ability to make informed decisions when voting such that one's actual preferences may be reflected when voting. This suggests that section 3 of the *Charter* would protect at least access to government information necessary to evaluate the performance of government in the determination and implementation of government policy.[127] This information is vital for citizens to be able to weigh the strengths and weaknesses of the government.

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126. Section 12 states:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

(a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations. R.S.O. 1990, c. F.31, s. 12 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given. R.S.O. 1990, c. F.31, s. 12 (2).

127. Such a right may not require contemporaneous release of information, as long as the information was available prior to the next election.

However, the Court's jurisprudence also suggests that participation in the political process may extend beyond the act of voting to include participation in the policy-making process through public discussion and debate. This broader definition of political participation would more likely be accommodated under s. 2(b) than under s. 3 of the *Charter*. In light of this, it is possible that a right to access government information protected by section 2(b) of the *Charter* may have a broader scope than a similar right protected by section 3 of the *Charter*. However, it is also worth noting that the Court may determine that the scope of access to information protected under section 2(b) should be narrowed in order to focus on information vital to the electoral process.

A full consideration of the specific types of information to be protected under a *Charter*- based right to access government information, though important, is beyond the scope of this article. As such, for the purpose of this section, I will focus on a possible section 3 claim against section 12 of *FOIPPA*. The first stage of the analysis, then, is to consider whether the mandatory exemption of access to Cabinet secrets under the section triggers the right of access protected by section 3 of the *Charter*. The issue to be determined is thus whether the restriction of access to Cabinet confidences infringes the right to vote by restricting the ability of citizens to make informed decisions when voting. Certainly, information concerning the potential policy options considered by Cabinet when making decisions, the content of debate concerning Cabinet decisions and the resulting decisions are all types of information that would assist citizens in the process of holding their elected officials accountable. What better way to assess the performance of a government than to know exactly which policy alternatives were considered and the reasons one particular alternative was chosen over others? As such, a restriction of access to Cabinet confidences would certainly trigger the proposed constitutional right to access government information.

The second stage of the analysis, then, is to consider whether the restriction of the right to access information may be justified under section 1 of the *Charter*. This requires a consideration of the factors outlined in the *Oakes* test.[128]

128. *R. v. Oakes*, [1986] 1 S.C.R. 103. Briefly stated, the *Oakes* test, or guidelines, require that the government demonstrate the following: (1) that the objective of the limitation is pressing and substantial; (2) that the limitation must be proportionate, including: (a) that the limitation is rationally connected to the objective of the limitation; (b) that the limitation minimally impairs the *Charter* right at issue; and (3) that the detrimental impact of the limitation on the *Charter* right is outweighed by the benefit achieved by the limitation.

Once it is affirmed that the restriction on the right access is 'prescribed by law', the first stage of the Oakes test requires that the government demonstrate that the objective of the restriction is 'pressing and substantial'. The Supreme Court has had a number of opportunities to discuss the objectives behind the exemption or exclusion of Cabinet confidences from legislative disclosure requirements as such restrictions on access have been challenged a number of times in the context of evidence legislation.[129]

In most cases, the exclusion of Cabinet confidence is justified, in part, by the fact that deliberations of the Cabinet are to remain confidential and all decisions are to be represented as decisions of a unified body. It is this requirement of confidentiality of Cabinet decision-making process that has been one of the most prevalent historical justifications for insulating Cabinet confidences from disclosure. Additional arguments in favour of the insulation of Cabinet confidences include the need to prevent capricious interference with the process of governance.

The protection of Cabinet confidences against disclosure in judicial proceedings and Access to Information proceedings has long roots in the history of the Canadian legal system. Historically, even the decision to declare a record as a Cabinet confidence was insulated from judicial review at common law such that judges were not permitted to review alleged Cabinet confidences. Over time, many of the reasons for insulating decisions concerning the disclosure Cabinet confidences from any type of judicial review were rejected by both English and Canadian courts and the absolute immunity of Cabinet confidences from judicial review was eroded at common law.[130] However, that absolute immunity was later reinstated by legislation protecting the disclosure of Cabinet confidences in judicial proceedings.[131] This insulation of Cabinet confidences was reflected in their exemption from disclosure under s. 12 of *FOIPPA*.

While many of the historical justifications for shielding decisions concerning whether information is properly considered to contain Cabinet confidences from any judicial review have been discredited, the basic contention that Cabinet confidences should be protected from disclosure in order to protect the system of responsible government remains largely uncontested. As a result, there is a strong argument that the restriction of access to Cabinet confidences fulfills a pressing and substantial objective.

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129. See, for example, *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, (2002), 214 D.L.R. (4th) 193 [*Babcock*].

130. For a discussion of the evolution of the common law treatment of this issue see: *Carey v. Ontario* (1986), 35 D.L.R. (4th) 161 (S.C.C.) [*Carey*]. See also, *R. v. Snider*, [1954] S.C.R. 479, [1954] 4 D.L.R. 483; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, 141 D.L.R. (3d) 395.

131. *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 41.

There is similarly a strong argument that a mandatory exemption of records containing Cabinet confidences from disclosure is 'rationally connected' to the pressing and substantial objective of protecting the efficacy of Cabinet deliberations. Certainly, there is a good argument that refusing access to the Cabinet secrets would promote Cabinet confidentiality and thereby improve the efficacy of Cabinet deliberations.

The more difficult aspect of the section 1 justification would be to demonstrate that the mandatory exemption from disclosure is a minimal impairment of the right to access information protected by section 3 of the *Charter.* At this stage of the analysis, it may be argued that a mandatory exemption of *all* records submitted to Cabinet, including briefing notes and policy papers, is overly broad and should be more carefully tailored. However, it could also be argued that the mandatory exemption embodied in section 12 of *FOIPPA* is less restrictive than the complete exclusion of Cabinet confidences from the ambit of the federal *Access Act.*[132] This complete exclusion, pursuant to section 69 of the federal *Access Act,* means that determinations of whether a record contains Cabinet confidences is not reviewable by the Information Commissioner of Canada.

Interestingly, not even the Information Commissioner of Canada has advocated that Cabinet confidences be subject to unlimited disclosure under the federal *Access Act.* Rather, the Information Commissioner has suggested that the federal *Access Act* be amended to include a mandatory exception for Cabinet confidences as opposed to a complete exclusion of this information from the ambit of the *Act.*[133] This proposed change to section 69 of the *Access Act* would mean that decisions concerning whether or not particular information includes Cabinet confidences and should be exempted from disclosure would be reviewable by the Information Commissioner, and ultimately the courts, based on a review of the information itself. However, information properly certified as containing Cabinet confidences would be subject to a mandatory exemption from disclosure. Ultimately, this would bring the federal *Access Act* into line with the approach set out in Ontario's *FOIPPA.*

Assuming that the Court found that the mandatory exemption of Cabinet records from disclosure pursuant to s. 12 of *FOIPPA* passed the minimal impairment stage of the analysis, the government would also

132. *Supra* note 4.

133. Information Commissioner of Canada, *Proposed Changes to the Access to Information Act*, online: <http://www.infocom.gc.ca/specialreports/pdf/Access_to_Information_Act_-_changes_Sept_28_2005E.pdf.> The Information Commissioner has also proposed that all decisions of Cabinet be disclosable four years after the decisions have been taken. In addition, he has proposed some modifications and clarifications to the definition of Cabinet confidences contained in the Act.

have to demonstrate that benefits achieved through the protection of the efficacy of Cabinet governance outweighed the deleterious effects of the restriction on the right of access imposed through the section. Here, the Court would have to consider whether the requirement that Cabinet confidences be protected from disclosure in order to protect the principle of responsible government outweighs the interest in access to this information as a mechanism for improving political accountability and political participation.

Ultimately, in my view, it will be possible for the government to justify at least certain restrictions on access to Cabinet confidences, although it may be more difficult to justify a complete exclusion of all documents provided to Cabinet from disclosure requirements. The importance of protecting decision-making process would prove a heavy, though not insurmountable, counter-balance to the interests in access. Indeed, it is likely that the vast majority of the existing legislative exemptions to disclosure requirements would be upheld as constitutionally valid if a *Charter* right to access government information is recognized. Certainly, existing restrictions on access to information that have been implemented in order to protect national security or national defence,[134] the policy-making process[135] and personal privacy[136] would be supported by robust justifications under a section 1 analysis. Thus while a constitutional protection of access to government information is both desirable and justifiable, its impact would most likely be felt where current legislative restrictions on access are increased or existing protections of access are repealed.

Conclusion

The framers of the Constitution proved reluctant to entrench a constitutional right to access government information in 1982 in part out of a belief that a legislative framework should precede consideration of constitutional entrenchment. That framework has been in place for more than a quarter century. More importantly, recognition of the importance of access to the effectiveness of the democratic process has grown exponentially in the intervening years. Indeed, the necessity of providing access to government information to ensure government accountability and meaningful democratic participation has been identified, in principle, by academics,

134. See, for example, s. 15 of the federal *Access Act*.

135. See, for example, s. 21 of the federal *Access Act*.

136. See, for example, s. 19 of the federal *Access Act*. I note that in so far as claims of personal privacy may trigger the *Charter* rights or interests of other individuals, the process of balancing privacy rights against access rights may occur outside of the s. 1 analysis.

judges, international organizations and even the Canadian government. This recognition has paralleled the rising expectations of citizens that they enjoy meaningful participation in the political process. At a minimum, this includes a growing expectation that they have sufficient information to make informed choices when selecting their elected representatives.

Unfortunately, the importance of access to government information to the democratic process has not always been recognized in practice. Failure to provide access to the government information necessary to allow citizens to make informed choices not only undermines the effectiveness of the democratic process, it undermines its legitimacy. One of the fundamental roles of the Canadian Constitution is to provide the necessary framework for effective democratic governance. While much of the framework of democratic governance has been shaped by Canadian legislatures, courts have a responsibility to intervene where the actions of the government are responsible for undermining the democratic process. One way in which courts may fulfill this responsibility is by ensuring that the interpretation of the Constitution ensures adequate protection of that process.

Consistent with this role and with its broad and purposive approach to constitutional interpretation, the Supreme Court of Canada has interpreted s. 2(b) and s. 3 of the *Charter* generously, recognizing the importance of both expression and voting to the realization of a meaningful democratic process in Canada. In its jurisprudence, the Court has reinforced the recognition of the importance of political debate and discussion to the democratic process. It has underlined the need for access to information to support the ability of citizens to make informed choices when voting and to support their right to be able to meaningfully participate in the political process, whether it be concerning issues of policy or governance.

The principle of democracy has provided the foundation for the Supreme Court's interpretation of sections 2(b) and 3. A proper consideration of the principle suggests that it also provides the necessary foundation to extend the scope of s. 2(b) and s. 3 to ensure that citizens have access to government information necessary to ensure their meaningful participation in the democratic process. Of course, such a right to access information would not be absolute. Rather, the imposition of reasonable limits on the right to access in order to protect important values and interests such as the efficacy of government decision-making and policy-development, national security and national defence to name a few, would be justifiable through section 1 of the *Charter*. Ultimately, interpreting the *Charter* in a way that protects access to government information ensures that citizens, not just academics, have something to talk about.